

LATHAM & WATKINS LLP
Alexander C.K. Wyman (Cal. Bar No. 295339)
alex.wyman@lw.com
355 South Grand Avenue, Suite 100
Los Angeles, CA 90071
Telephone: +1.213.485.1234
Facsimile: +1.213.891.8763

Serrin Turner (*pro hac vice*)
serrin.turner@lw.com
Matthew P. Valenti (*pro hac vice*)
matthew.valenti@lw.com
1271 Avenue of the Americas
New York, NY 10020
Telephone: +1.212.906.1200
Facsimile: +1.212.751.4864

Attorneys for Defendant
Whaleco Inc. d/b/a Temu

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In re : Whaleco Inc. Malware
Litigation

This Document Relates To:
All Actions

Case No. 2:25-cv-04651-MRA-MAA

**DEFENDANT WHALECO INC.'S
REPLY TO PLAINTIFFS'
OPPOSITION TO MOTION TO
DISMISS OR, IN THE
ALTERNATIVE, MOTION TO
TRANSFER FOR *FORUM NON
CONVENIENS***

Judge: Hon. Mónica Ramírez Almadani
Hearing Date: August 25, 2025
Time: 1:30 pm
Courtroom: 9B

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

Page

| | | |
|------|--|----|
| I. | INTRODUCTION | 1 |
| II. | ARGUMENT | 2 |
| A. | Plaintiffs Agreed to the Terms by Registering Temu Accounts..... | 2 |
| B. | The Terms Do Not Allow Plaintiffs to Sue Temu in California Court, and the <i>Forum Non Conveniens</i> Factors Separately Militate in Favor of Transfer to New York..... | 7 |
| III. | CONCLUSION | 11 |

TABLE OF AUTHORITIES

Page(s)

CASES

| | |
|--|---------|
| <i>Alatortev v. JetBlue Airways Corp.</i> , 795 F. App’x 503 (9th Cir. 2019)..... | 8 |
| <i>Baglama v. MWV Consumer & Off. Prod.</i> , 2013 WL 12200647 (C.D. Cal. Aug. 19, 2013)..... | 10 |
| <i>Berman v. Freedom Fin. Network, LLC</i> , 30 F.4th 849 (9th Cir. 2022)..... | 3, 6 |
| <i>Brooks v. Warnermedia Direct LLC</i> , 2023 WL 10706636 (C.D. Cal. Dec. 1, 2023) | 9 |
| <i>Eakins v. Whaleco, Inc.</i> , 721 F. Supp. 3d 1252 (W.D. Okla. 2024) | 4 |
| <i>Fontanez v. Whaleco, Inc.</i> , 53-3032CA-00374 (Fla. Polk Cnty. Ct. Nov. 15, 2023) | 4 |
| <i>HTC Corp. v. Acacia Rsch. Corp.</i> , 2015 WL 9915938 (C.D. Cal. Sept. 10, 2015)..... | 10 |
| <i>Hu v. Whaleco, Inc.</i> , 2024 WL 4481439 (E.D.N.Y. Oct. 1, 2024) | 4, 5 |
| <i>Keebaugh v. Warner Bros. Ent. Inc.</i> , 100 F.4th 1005 (9th Cir. 2024)..... | 3 |
| <i>Kohler v. Whaleco, Inc.</i> , 757 F. Supp. 3d 1112 (S.D. Cal. 2024) | 4, 5, 6 |
| <i>Lee v. Ticketmaster L.L.C.</i> , 817 F. App’x 393 (9th Cir. 2020)..... | 6 |
| <i>Mohamed v. Uber Techs., Inc.</i> , 848 F.3d 1201 (9th Cir. 2016)..... | 9 |
| <i>Navarro v. SmileDirectClub, Inc.</i> , 2022 WL 1786582 (N.D. Cal. June 1, 2022) | 2 |

| | | |
|----|---|------------|
| 1 | <i>Nguyen v. Barnes & Noble Inc.,</i> | |
| 2 | 763 F.3d 1171 (9th Cir. 2014)..... | 3 |
| 3 | <i>Nicosia v. Amazon.com, Inc.,</i> | |
| 4 | 834 F.3d 220 (2d Cir. 2016)..... | 2 |
| 5 | <i>Oberstein v. Live Nation Ent, Inc.,</i> | |
| 6 | 60 F.4th 505 (9th Cir. 2023)..... | 2, 3, 5, 6 |
| 7 | <i>People ex rel. Dep’t of Parks & Recreation v. West-A-Rama, Inc.,</i> | |
| 8 | 35 Cal. App. 3d 786 (1973)..... | 8 |
| 9 | <i>Pixior Glob. Logistics, LLC v. Walmart, Inc.,</i> | |
| 10 | 2023 WL 11802488 (C.D. Cal. Sept. 29, 2023)..... | 10 |
| 11 | <i>Silva v. Whaleco, Inc.,</i> | |
| 12 | 2024 WL 4487421 (N.D. Cal. Oct. 10, 2024)..... | 4, 5, 6 |
| 13 | <i>Smith v. Whaleco, Inc.,</i> | |
| 14 | 741 F. Supp. 3d 1104 (W.D. Okla. 2024) | 4 |
| 15 | <i>Suski v. Coinbase, Inc.,</i> | |
| 16 | 55 F.4th 1227 (9th Cir. 2022)..... | 9 |

COURT FILINGS

| | | |
|----|--|----|
| 17 | <i>Ziboukh et al. v. Whaleco, et al.,</i> No. 1:24-cv-3733-MKB-RML | |
| 18 | (E.D.N.Y. Feb. 18, 2025), ECF No. 78 | 10 |

I. INTRODUCTION

Plaintiffs’ opposition provides no sensible reason why this case should remain in this Court. Plaintiffs concede they “are registered users of the Temu e-commerce platform.” Opp. at 2. They acknowledge that one cannot register for a Temu account without clicking on a “Register” button right above text stating: “By clicking Register, you agree to our Terms of Use” *Id.* at 4. And they further acknowledge that the Terms contain “both an Arbitration Agreement and an ‘Exclusive Venue’ clause, which designates New York, New York courts for any litigation not subject to the Arbitration agreement.” *Id.* Under no circumstances do the Terms allow claims to be brought against Temu in California court. So what are Plaintiffs doing here?

Plaintiffs make a half-hearted attempt to argue that they never agreed to the Terms, griping that there was no “checkbox” they had to click to indicate agreement when they registered. But the law does not require any such “checkbox,” and Temu’s registration screen makes perfectly clear that clicking on the button needed to continue with the registration process constitutes assent to the Terms. That is why multiple courts in this Circuit have held that Temu’s registration screen gives users adequate notice of the Terms—holdings that Plaintiffs entirely ignore. Moreover, Plaintiffs’ counsel themselves, in correspondence with defense counsel, have implicitly acknowledged the Terms are binding on Plaintiffs: They stated that they intended to initiate informal dispute resolution conferences for their clients *pursuant to the Terms*, which require such conferences as a precondition to arbitration. (Plaintiffs backtracked only after defense counsel told them they would have to dismiss their litigation before Temu would schedule such conferences.)

Having no real basis to contest they agreed to the Terms, Plaintiffs argue that, even if they did agree to the Terms, Temu should move to compel arbitration rather than moving to dismiss or transfer for improper forum. If Plaintiffs are conceding their claims are subject to arbitration, then Temu certainly has no objection if the Court dismisses the claims and compels arbitration instead. But if Plaintiffs seek to

1 litigate over the arbitrability of their claims (despite the delegation provision in the
2 Terms), they are not entitled to forum-shop as to where that litigation occurs. The
3 Terms only provide for two possibilities: arbitration or litigation in New York courts.
4 There is no third option to litigate elsewhere. Moreover, beyond the forum selection
5 clause, standard *forum non conveniens* factors militate in favor of transferring the
6 case to New York, as this copycat litigation is duplicative of lawsuits already
7 pending in the Eastern District of New York.

8 Lastly, Plaintiffs argue that if the Court finds that the forum selection clause
9 governs, the Court should transfer the litigation rather than dismissing it. This is
10 another non-issue. It makes no difference to Temu whether the Court dismisses or
11 transfers this case. The point is there is no reason for the litigation to continue here.

12 **II. ARGUMENT**

13 **A. Plaintiffs Agreed to the Terms by Registering Temu Accounts**

14 Plaintiffs admit they are “registered users of the Temu e-commerce platform,”
15 who clicked on a “large ‘Register’ button” right above text stating, “by clicking
16 Register you agree to our Terms of Use.” Opp. at 4. Yet Plaintiffs claim they did not
17 agree to the Terms when they registered, arguing that there was no “dedicated
18 checkbox” they had to click to indicate their agreement. *Id.* at 7-8. It is well
19 established, however, that such a checkbox—*i.e.*, “clickwrap”—is not necessary for
20 a user to assent to terms of use. *See, e.g., Oberstein v. Live Nation Ent., Inc.*, 60 F.4th
21 505, 514 (9th Cir. 2023) (“[W]hile clickwrap represents ‘the clearest manifestations
22 of assent’ ... it is ‘not necessarily required.’”) (quoting *Nicosia v. Amazon.com, Inc.*,
23 834 F.3d 220, 237–38 (2d Cir. 2016)); *Navarro v. SmileDirectClub, Inc.*, 2022 WL
24 1786582, at *4 (N.D. Cal. June 1, 2022) (“Courts ... have upheld ... agreements ...
25 even where the user is not required to check a separate dialog box to indicate
26 assent.”) (collecting cases). Assent can also be manifested through other actions, if
27 users are put on notice that the action will be taken to indicate their assent—
28 including where users are “presented with a confirmation button” and the

1 accompanying “text informs the user that, by clicking on this button, ‘you agree to
2 our Terms of Use.’” *Oberstein*, 60 F.4th at 515; *see also Keebaugh v. Warner Bros.*
3 *Ent. Inc.*, 100 F.4th 1005, 1014 (9th Cir. 2024) (explaining this concept as “sign-in
4 wrap” and explaining that it is an acceptable form of notice).

5 Plaintiffs’ cited cases do not suggest otherwise. *Nguyen v. Barnes & Noble*
6 *Inc.* involved a “browsewrap” agreement—where there was no confirmation button
7 or other specific means of indicating consent. The case held that users could not be
8 considered to have impliedly given assent “simply by using the website” at issue.
9 763 F.3d 1171, 1176 (9th Cir. 2014) (quotation marks omitted). That is
10 fundamentally different from Temu’s *sign-in wrap* agreement, which requires a user
11 to click on a specific button to register an account while specifically being told that
12 doing so will constitute acceptance of the Terms. The other case Plaintiffs rely on,
13 *Berman v. Freedom Fin. Network, LLC*, makes clear that the very language used by
14 Temu is sufficient to obtain the user’s knowing assent, without a checkbox. 30 F.4th
15 849, 858 (9th Cir. 2022) (explaining that language such as “By clicking the Continue
16 button, you agree to the Terms & Conditions” sufficiently apprises the user of the
17 “legal significance of the action she must take to enter into a contractual
18 agreement”). Such language was missing in *Berman*, *see id.*, but it is present here.

19 The screenshot of Temu’s registration flow included in Plaintiffs’ opposition
20 brief itself shows that Temu notifies users that clicking on the “Register” button
21 constitutes assent to the Terms: Immediately under the button, the screen states, in
22 perfectly legible type, “By clicking Register, you agree to our Terms of Use and
23 Privacy Policy”—with both “Terms of Use” and “Privacy Policy” underlined and in
24 blue, hyperlinked font. Opp. at 4. Moreover, although Plaintiffs neglect to mention
25 it, this is only one screen shown during the account registration process, which is
26 displayed specifically where the user opts to register with an email address. Before
27 reaching this screen, the user is presented with a prior screen allowing them to
28 choose whether to register using an email address, a phone number, or sign-on

1 services offered by third parties, such as Google. *See Kohler v. Whaleco, Inc.*, 757
2 F. Supp. 3d 1112, 1119 (S.D. Cal. 2024) (depicting prior screen). That prior screen
3 includes “Continue” buttons for the various registration options, along with text
4 underneath the buttons stating that “By continuing, you agree to our Terms of
5 Service and Privacy Policy,” with links to those agreements. *Id.* So, Temu users have
6 to click on *two* buttons to register an account—first a “Continue” button, and then a
7 “Register” button—and they are told *both* times that clicking constitutes agreement
8 to the Terms. *See id.* at 1114 n.5 (noting, as a factor supporting adequate notice, that
9 “‘Temu users encounter the ‘Terms of Use and Privacy Policy’ more than once
10 during the registration process’” (quoting *Silva v. Whaleco, Inc.*, 2024 WL 4487421,
11 at *4 (N.D. Cal. Oct. 10, 2024)))).

12 Hence, Temu’s registration flow makes it clear that users assent to the Terms
13 when they register. It is little wonder, then, that multiple courts in this Circuit have
14 specifically found that Temu’s account registration process provides a valid means
15 of obtaining user consent to the Terms. *See Kohler*, 757 F. Supp. 3d at 1124 (“The
16 Court finds that Plaintiff unambiguously assented to Temu’s Terms by pressing the
17 ‘Continue’ button multiple times prior to purchasing items on Temu’s Website.”);
18 *Silva*, 2024 WL 4487421 (N.D. Cal. Oct. 10, 2024), at *3-5 (“[T]he Court finds that
19 Plaintiff accepted Temu’s Terms of Use through its website’s ‘sign-in wrap’ process,
20 which put Plaintiff on constructive notice of its Terms of Use.”).¹

21
22
23 ¹ Courts outside this Circuit have reached similar holdings. *See Hu v. Whaleco, Inc.*,
24 2024 WL 4481439, at *18 (E.D.N.Y. Oct. 1, 2024) (“After balancing the factors, the
25 Court finds that the Registration Screen provided Plaintiffs ‘reasonably conspicuous
26 notice’ of the Terms, and Plaintiffs, through their conduct, unambiguously
27 manifested assent to the Terms.”); *Fontanez v. Whaleco, Inc.*, 53-3032CA-00374,
28 at 5 (Fla. Polk Cnty. Ct. Nov. 15, 2023) (attached hereto as Declaration of Serrin
Turner, Ex. A, at 8) (finding that Temu’s “full screen user interface design with the
‘Continue’ button just above the bolded hyperlink to the Terms of Use is
conspicuous enough to put a reasonably prudent person on inquiry notice”). As *Hu*
notes, there are other out-of-circuit cases that go the other way, but they are
unpersuasive. *See* 2024 WL 4481439, at *14-15 (considering, but declining to agree
with, *Smith v. Whaleco, Inc.*, 741 F. Supp. 3d 1104, 1112 (W.D. Okla. 2024) and
Eakins v. Whaleco, Inc., 721 F. Supp. 3d 1252, 1258, 1260 (W.D. Okla. 2024)).

1 What *is* surprising is that Plaintiffs do not even mention these holdings—let
2 alone attempt to distinguish or dispute them—in their opposition. Instead, they make
3 perfunctory complaints about Temu’s registration screen that are belied by the
4 screenshot of the registration screen itself and that were specifically rejected in *Silva*
5 and *Kohler*.

6 *First*, Plaintiffs complain about the font size, claiming that “[t]he text
7 referencing the Terms was in a small, inconspicuous font and embedded in a dense
8 block of other text and overshadowed by more prominent interface elements.” Opp.
9 at 6-7. Not so. “The language ... is large enough to read,” and the reference to the
10 “Terms of Use” “is capitalized and underlined in blue, which stands out from the
11 surrounding text.” *Silva*, 2024 WL 4487421, at *4. “Further, [the] Temu registration
12 pop-up windows are uncluttered and contain no extraneous information.” *Id.* Thus,
13 “a reasonable user would have seen the notice and been able to locate the Terms via
14 hyperlink.” *Kohler*, 757 F. Supp. 3d at 1124 (quoting *Oberstein*, 60 F.4th at 516).
15 “Indeed, ‘[a] comparison of Temu’s notice with the notices at issue in [the Ninth
16 Circuit’s decisions in] *Oberstein* and *Keebaugh* reveals that Temu’s notice clearly
17 passes the test.’” *Id.* (quoting *Silva*, 2024 WL 4487421, at *4); *see also Hu*, 2024
18 WL 4481439, at *15 (finding adequate notice “[b]ecause [Temu’s] Registration
19 Screen appears uncluttered, is visible at once, and the notice and bolded hyperlinks
20 are reasonably conspicuous and spatially and temporally coupled with a user’s
21 creation of an account”).

22 *Second*, Plaintiffs baselessly complain that “the user’s action of clicking
23 ‘Register’ is not clearly labeled as assent to a contract” because the text “merely
24 states that ‘by clicking Register, our [sic] agree to our Terms of use and Privacy
25 Policy.’” Opp. at 6. Plaintiffs ignore that this is *precisely* the sort of language the
26 Ninth Circuit has *approved* for sign-in wrap agreements. As the *Berman* case
27 Plaintiffs cite specifically holds: “A user’s click of a button can be construed as an
28 unambiguous manifestation of assent ... if the user is explicitly advised that the act

1 of clicking will constitute assent to the terms and conditions of an agreement.” 30
2 F.4th at 857. That is exactly what Temu’s prompt advises users: clicking on the
3 “Register” button (as well as the “Continue” button in the prior screen) will
4 constitute acceptance. *See Kohler*, 757 F. Supp. 3d at 1124 (finding *Berman* satisfied
5 because “Temu’s consumers must affirmatively click the ‘Continue’ button to assent
6 to Temu’s Terms”).

7 *Third*, Plaintiffs invoke a requirement of actual notice that does not exist,
8 arguing that “[t]here is no evidence that users are directed to click on the terms of
9 service, or that they must scroll through or affirmatively accept the arbitration or
10 forum selection clauses before completing registration.” Opp. at 6-7. The law does
11 not require companies to force users to actually read terms of use. Rather, it is
12 sufficient to provide *constructive* notice of the applicable terms, so that users *can*
13 review the terms if they so choose. *See, e.g., Oberstein*, 60 F.4th at 516 (explaining
14 that under the doctrine of constructive notice, it is enough that “a reasonable user
15 would have seen the notice [of the Terms] and been able to locate the Terms via
16 hyperlink”). Temu does so: It informs users they will be deemed to have accepted
17 the Terms by registering an account, and it provides a link they can click on if they
18 want to read the Terms before accepting. No more is required. *See Kohler*, 757 F.
19 Supp. 3d at 1124 (“Plaintiff asserts that she did not assent because she does not recall
20 seeing Temu’s Terms and did not click on any hyperlinks. Plaintiff’s statement does
21 not change the analysis.”); *Silva*, 2024 WL 4487421, at *4 (“As should be apparent,
22 the definition of a sign-in wrap agreement is that the Terms of Use are *available* to
23 a prospective user, usually through a hyperlink. In other words, a valid sign-in wrap
24 agreement does not require that the Terms of Use appear separately to a consumer
25 unless he or she clicks the hyperlink.”) (emphasis in original); *see also Lee v.*
26 *Ticketmaster L.L.C.*, 817 F. App’x 393, 395 (9th Cir. 2020) (A website user “cannot
27 avoid the terms of [the] contract on the ground that he ... failed to read it before
28 signing.”).

1 In short, none of Plaintiffs’ objections to Temu’s registration flow withstand
2 the slightest scrutiny—nor do Plaintiffs themselves appear to believe them.
3 Tellingly, although Plaintiffs now contest the enforceability of the Terms in their
4 opposition brief, Plaintiffs’ counsel tacitly acknowledged that Plaintiffs agreed to
5 the Terms in correspondence with defense counsel. During a telephonic meet-and-
6 confer on June 26, 2025, defense counsel told Plaintiffs’ counsel that the Terms
7 require that Plaintiffs’ dispute with Temu be pursued through arbitration and that, in
8 order to initiate arbitration, Plaintiffs must first schedule informal dispute resolution
9 conferences. Plaintiffs’ counsel followed up by email several weeks later, on July 8,
10 2025, stating that “[i]t is our intention to proceed with these conferences”—“per the
11 Temu TOS [Terms of Service].” Declaration of Serrin Turner, Ex. B, Jun. 24-Jul. 9,
12 2025 Email Chain Between K. Hemming and A. Wyman, at 12. Plaintiffs’ counsel
13 abandoned this course after defense counsel informed them they would need to
14 voluntarily dismiss their pending court cases if they planned to proceed with
15 arbitration. *Id.* at 11. But notwithstanding their backpedaling, Plaintiffs’ stated
16 “intention” to proceed “per the Temu TOS” plainly reflects an understanding that
17 Plaintiffs are bound by those Terms. *Id.* at 12. This tacit admission only underscores
18 what is already evident from the facts and the law: Plaintiffs accepted the Terms by
19 registering accounts with Temu.

20 **B. The Terms Do Not Allow Plaintiffs to Sue Temu in California**
21 **Court, and the *Forum Non Conveniens* Factors Separately Militate**
22 **in Favor of Transfer to New York**

23 Aside from their specious arguments that they did not agree to the Terms,
24 Plaintiffs alternatively argue that, even if they did agree to the Terms, Temu cannot
25 enforce the Terms’ forum selection clause against them but must instead move to
26 compel arbitration. *Opp.* at 8-10. The argument does not help Plaintiffs as it does
27 not lead to the conclusion that they can litigate in this Court. To be clear, if the Court
28 wishes to compel arbitration—as Plaintiffs do not appear to contest that the
arbitration agreement applies if the Terms apply—Temu would welcome that

1 outcome.² But to the extent Plaintiffs seek to continue litigating in court for whatever
2 reason—including as part of any (misguided) attempt to challenge the enforceability
3 of the arbitration agreement—they should not be permitted to do so in this Court.
4 The point remains that the Terms provide for only two possibilities: arbitration or,
5 for disputes not subject to arbitration, litigation in New York court. There is no
6 option for litigating outside New York, as Plaintiffs are stubbornly seeking to do
7 here. Moreover, given that this litigation is duplicative of litigation already pending
8 in New York federal court, transfer to that court is independently warranted in order
9 to avoid wasting judicial resources and ensure consistent results across cases.

10 It is a “cardinal rule of construction that a contract is to be construed as a
11 whole, effecting harmony among and giving meaning to all the parts thereof.”
12 *Alatortev v. JetBlue Airways Corp.*, 795 F. App’x 503, 504 (9th Cir. 2019) (quoting
13 *People ex rel. Dep’t of Parks & Recreation v. West-A-Rama, Inc.*, 35 Cal. App. 3d
14 786, 793 (1973)). Here, as Plaintiffs seem to recognize, the arbitration provision and
15 the forum selection clause in the Terms are meant to work together: the arbitration
16 clause applies, with limited exceptions, to any dispute “arising out of or relating to”
17 Temu’s services; and for any dispute “not subject to arbitration,” it “shall be decided
18 exclusively by a court of competent jurisdiction located in New York, New York.”
19 ECF No. 16-3, Temu Terms of Use, §§ 18.4, 19.1. The range of possibilities is thus
20 purely binary: either a dispute belongs in arbitration, or it belongs in a New York
21 court. Opp. at 9-10 (“The terms of service clearly state that any dispute is subject to
22 the arbitration agreement first, and then if the claim is not subject to arbitration it
23 should be decided by a court of competent jurisdiction located in New York.”).

24 Despite this, Plaintiffs have not sought to initiate arbitration; nor have they
25 brought suit in New York court. Instead, they have chosen to litigate here in

26
27 ² In order to pursue arbitration, however, Plaintiffs would have to comply with the
28 preconditions to arbitration contained in the Terms, including scheduling informal
dispute resolution conferences, as they thus far have been unwilling to do. To the
extent Plaintiffs intend to challenge that requirement, the Terms do not permit them
to do so in California court.

1 California, which is an avenue that the Terms do not leave open. Plaintiffs’ argument
2 that the arbitration clause is logically prior to the forum selection clause—in the
3 sense that only non-arbitrable disputes are meant to be litigated in court—does not
4 somehow imply that Plaintiffs get to bring *arbitrable* disputes in any court of their
5 choosing. The point remains that the Terms do not countenance any litigation outside
6 New York, whether the dispute is arbitrable or not. *See Brooks v. Warnermedia*
7 *Direct LLC*, 2023 WL 10706636, at *8 (C.D. Cal. Dec. 1, 2023), *adopted*, 2023 WL
8 10705852 (C.D. Cal. Dec. 4, 2023) (“Looking to the contract as a whole, a simpler
9 and more far more plausible interpretation [than the plaintiff’s view that a challenge
10 to the arbitration agreement could be brought in any court] is that the forum-selection
11 clause is intended to encompass anything that would not go to arbitration ...”). For
12 that reason, the litigation should be dismissed—in which case Plaintiffs can pursue
13 arbitration if they so choose (and if they comply with all applicable arbitration-
14 related requirements)—or transferred to the Eastern District of New York, where
15 Temu will move to compel arbitration. The case cannot otherwise proceed in
16 California court consistent with the Terms.³

17 Moreover, separate and apart from the Terms, standard *forum non conveniens*
18 factors—in particular the interests of justice—counsel in favor of transferring this
19 litigation to New York federal court, specifically the Eastern District of New York
20 (“EDNY”). As explained in Temu’s opening brief, this matter is blatant copycat
21

22 ³ Plaintiffs’ case citations, Opp. at 8-9, only confuse the issue. In *Suski v. Coinbase,*
23 *Inc.*, the plaintiff contested that an arbitration clause applied, based on a forum
24 selection clause in another agreement requiring disputes between the parties to be
25 brought in California court, which is where the *Suski* litigation was filed. 55 F.4th
26 1227, 1230-31 (9th Cir. 2022). Similarly, in *Mohamed v. Uber Techs., Inc.*, the
27 plaintiff contested that an arbitration clause applied based on a contract provision
28 providing for exclusive venue in San Francisco court—where the case had been
brought. 848 F.3d 1201, 1209 (9th Cir. 2016). The cases came out different ways
based on the facts, but both are inapposite: Here, Temu is obviously not contesting
the applicability of its own arbitration clause, nor is the arbitration clause in conflict
with the forum selection clause. Rather, the point is that the forum selection clause
in Temu’s Terms—unlike the ones in *Suski* and *Mohamed*—does not permit suit to
be brought in any circumstances in California court, where Plaintiffs have filed this
litigation.

1 litigation based on lawsuits presently pending in EDNY, with allegations lifted
2 virtually verbatim from the complaints filed there. Mot. at 4-5. Even in their
3 opposition brief, Plaintiffs continue to duplicate arguments made in the EDNY
4 litigation, as they contend that Temu’s account registration flow fails to provide
5 constructive notice of the Terms—just as the plaintiffs have argued in the *Ziboukh*
6 case pending in EDNY. *See* Pls.’ Opp. to Defs.’ Mot. to Compel Arbitration,
7 *Ziboukh et al. v. Whaleco, et al.*, No. 1:24-cv-3733-MKB-RML, at 13-15 (E.D.N.Y.
8 Feb. 18, 2025), ECF No. 78.

9 There is no reason why this Court should separately weigh in on any of these
10 issues. “Litigation of related claims in the same tribunal is strongly favored because
11 it facilitates efficient, economical and expeditious pre-trial proceedings and
12 discovery and avoids duplicative litigation and inconsistent results.” *HTC Corp. v.*
13 *Acacia Rsch. Corp.*, 2015 WL 9915938, at *3 (C.D. Cal. Sept. 10, 2015) (cleaned
14 up). Those interests strongly favor transfer here. All of the litigation brought against
15 Temu in EDNY has already been deemed related and is pending before a single
16 judge. Transferring this case to that same judge will avoid unnecessarily duplicating
17 litigation across districts and will ensure consistent rulings across proceedings.
18 *Pixior Glob. Logistics, LLC v. Walmart, Inc.*, 2023 WL 11802488, at *5 (C.D. Cal.
19 Sept. 29, 2023) (“The pendency of [a] related action against [the defendant] in
20 EDNY weighs in favor of transfer to avoid duplicative litigation and potentially
21 conflicting rulings on similar issues.”); *Baglama v. MWV Consumer & Off. Prod.*,
22 2013 WL 12200647, at *7 (C.D. Cal. Aug. 19, 2013) (“Where legal issues
23 substantially overlap, transfer is warranted because it would be more convenient and
24 efficient for one court to consider all the issues together.”) (cleaned up).

III. CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' Complaint, or in the alternative, transfer this action to EDNY pursuant to the doctrine of *forum non conveniens*.

Dated: August 11, 2025

Respectfully submitted,

LATHAM & WATKINS LLP

By: /s/ Serrin Turner

Serrin Turner (*pro hac vice*)

serrin.turner@lw.com

Matthew P. Valenti (*pro hac vice*)

matthew.valenti@lw.com

1271 Avenue of the Americas

New York, NY 10020

Telephone: +1.212.906.1200

Facsimile: +1.212.751.4864

Alexander C.K. Wyman

alex.wyman@lw.com

355 South Grand Avenue, Suite 100

Los Angeles, CA 90071

Telephone: +1.213.485.1234

Facsimile: +1.213.891.8763

Attorneys for Defendant

Whaleco Inc. d/b/a Temu

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Defendant Whaleco Inc., certify that this Reply contains 3,719 words, which complies with the word limit of L.R. 11-6.1.

Dated: August 11, 2025

Respectfully submitted,

LATHAM & WATKINS LLP

By: /s/ Serrin Turner

Serrin Turner (*pro hac vice*)

serrin.turner@lw.com

Matthew P. Valenti (*pro hac vice*)

matthew.valenti@lw.com

1271 Avenue of the Americas

New York, NY 10020

Telephone: +1.212.906.1200

Facsimile: +1.212.751.4864

Alexander C.K. Wyman

alex.wyman@lw.com

355 South Grand Avenue, Suite 100

Los Angeles, CA 90071

Telephone: +1.213.485.1234

Facsimile: +1.213.891.8763

Attorneys for Defendant

Whaleco Inc. d/b/a Temu